No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF REVERSAL

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This brief is respectfully submitted on behalf of the National Association of Broadcasters, American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. as *amici curiae*. Pursuant to Rule 36.2 of the rules of this Court, *amici* have obtained and filed the written consents of each of the parties to the filing of this brief. The *amici curiae* support the position of petitioners in this case and urge reversal

of the decision below. This brief, filed on their behalf, is devoted primarily to the issue of the constitutionality under the First Amendment of Oklahoma's wholesale prohibition on commercial advertisements for liquor products.

Interest of *Amici Curiae*

The National Association of Broadcasters ("NAB") is a nonprofit incorporated association of radio and television broadcast stations and broadcast networks. As of November 9, 1983, NAB membership included 4,387 radio stations, 700 television stations and all the major commercial broadcast networks. Among NAB's members are stations broadcasting within the State of Oklahoma, as well as out-of-state broadcasters whose programming is carried by the petitioner cable companies within the State of Oklahoma.

American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS") and National Broadcasting Company, Inc. ("NBC") each operate national television and radio networks and are engaged, *inter alia*, in producing news and entertainment programming and disseminating it to the public through their owned and affiliated broadcast stations throughout the country. ABC, CBS and NBC each have affiliated broadcast stations in Oklahoma. Cable systems located within the State of Oklahoma carry the national and local programming of the in-state affiliates as well as the programming of certain network affiliates located outside the state. Unlike the services offered by petitioners, the broadcast programming supplied by each of the networks and their affiliates is provided free of cost to the public by the sale of commercial time to national and local advertisers. Each of the networks presents advertisements, through their affiliates, of a type prohibited by the Oklahoma statute.[1] Thus, each of the *amici* has a clear stake in the outcome of this litigation.

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1 Although the Oklahoma regulatory scheme applies to all alcoholic beverages containing more than 3.2 percent alcohol, each of the

More broadly, each of the *amici* has an interest in the serious First Amendment issues raised by Oklahoma's prohibition of an entire category of truthful advertising of products which are lawfully sold within the state. If the decision below is permitted to stand, it will eviscerate protections afforded by the Constitution designed to assure that states do not interfere with the free flow of information to the public.

This brief, *amici curiae*, is submitted in support of *amici*'s position that Oklahoma's regulatory scheme is plainly unconstitutional.

SUMMARY OF ARGUMENT

Oklahoma's sweeping prohibition on the broadcasting and other dissemination of liquor advertising is utterly inconsistent with the well-established and controlling principles set forth by this Court from its first recognition of First Amendment protection for commercial speech to its most recent. This brief first addresses the Tenth Circuit's misperception of this Court's summary dismissal in *Queensgate Investment Co.* v. *Liquor Control Commission*—a misperception which infects the Tenth Circuit's entire analysis of the issues raised here. The states' power to regulate the importation and transportation of liquor is next considered and the notion that the Twenty-first Amendment can be said to override the First Amendment principles that would otherwise be dispositive here is analyzed and rejected. This Court's commercial speech decisions are then reviewed. It is urged that the decision in *Bigelow* v. *Virginia*, which also dealt with a total prohibition on advertising, is dispositive of the issues presented and in and of itself mandates reversal of the court below.

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networks has chosen neither to accept nor broadcast advertisements for alcoholic beverages other than beer or wine. Because advertisements for beer generally do not specify alcoholic content, the advertising of beer has been permitted in Oklahoma. Petition ("Pet.") at 3a-4a.

ARGUMENT

The Decision of the Tenth Circuit is Inconsistent With Well-Established Protections Afforded by the First Amendment to Commercial Speech

1. The Summary-Dismissal Question

Throughout the course of its opinion, the Tenth Circuit placed enormous weight on the effect of this Court's summary dismissal of the appeal taken in *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 103 S. Ct. 31 (1982). Although the court below acknowledged this Court's warning to lower courts to avoid being "so preoccupied with a summary dismissal that they fail 'to undertake an independent examination of the merits' " (699 F.2d at 497; Pet. at 15a) (quoting *Mandel* v. *Bradley*, 432 U.S. 173, 177 (1977) (*per curiam*)), the pervasive influence of the Tenth Circuit's misapprehension of the effect of the summary dismissal in *Queensgate* is evident throughout the opinion. *See*, *e.g.*, 699 F.2d at 498, 499, 502; Pet. at 15a, 18a-19a, 24a.

While it has long been clear that summary dismissals are dispositions on the merits, *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975), they "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).[2] Sum-

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2 "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary [dispositions] may appear to have established." *Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring). *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) (summary dispositions "have considerably less precedential value than an opinion on the merits").

Inherently, a summary dismissal without opinion does not adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolu-

mary dismissals have accordingly been narrowly interpreted to extend only to "the precise issues presented and necessarily decided," *Mandel* v. *Bradley, supra*, 432 U.S. at 176 and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 183. In failing to identify the precise and distinct issues raised in *Queensgate* and in extrapolating broad—and hitherto unsupported—constitutional doctrines from it, the Tenth Circuit failed to give effect to this Court's warnings about the careful and circumscribed use to be made of summary dispositions.

The regulatory scheme at issue in *Queensgate* was radically different from that before the Tenth Circuit in this action. For one thing, the Oklahoma statute is a blunderbuss ban on the advertising of alcoholic beverages barring, at pain of criminal sanctions, all broadcasters, cable companies and the like from any liquor advertising. The Ohio regulation at issue in *Queensgate* was narrowly directed to liquor licensees themselves and restricted the advertisement by them of certain specific price information alone. Ohio Admin. Code § 4301: 1-1-44(A). *See Queensgate Investment Co.* v. *Liquor Control Commission, supra*, 69 Ohio St.2d at 361 n.1, 433 N.E.2d at

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tion of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting from the denial of the petition for a writ of *certiorari*). Summary dispositions lack "any substantive discussion" of the issues, *Edelman* v. *Jordan, supra*, 415 U.S. at 670 (1974), and only affirm the judgment but not necessarily the reasoning of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (summary disposition "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary acton"). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary dismissal. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

139 n.1. Not only were the Ohio regulations directed to a completely different class of speakers, but the regulations at issue in *Queensgate* expressly recognized the right of manufacturers and distributors of alcoholic beverages to advertise their products in Ohio as well as the right of liquor licensees "to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines." *Id.* In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981)—this Court's most recent pronouncement on the effect of summary dispositions—this Court emphasized that differences in the scope or application of state regulations necessarily alter the issues presented to the Court and preclude reliance on summary dispositions.

It is apparent that the differences between the Ohio and Oklahoma statutory schemes presented radically different issues. Yet the Tenth Circuit considered itself bound by *Queensgate* and went so far as to interpret this Court's summary disposition there as standing for the proposition that

> "[w]hen the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result." 699 F.2d at 502; Pet. at 24a.

As demonstrated above, the Tenth Circuit's conclusion that it was bound by the decision in *Queensgate* despite the fact that the Ohio and Oklahoma regulatory schemes are not comparable is in itself an error of serious proportions. For it then to have extrapolated from the *Queensgate* dismissal a constitutional principle broader than ever before articulated by this Court is utterly without basis and undermines its entire analysis. As will be seen, this Court's prior decisions on the relationship between the Twenty-first Amendment and other constitutional guarantees not only do not "mandate" the conclusion reached by the Tenth Circuit, but they do not in any way support it.

2. The Twenty-First Amendment Issue

The grant to the states in Section 2 of the Twenty-first Amendment of the power to control the "transportation or importation" of liquor into their territories "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol[,]" but, as this Court has made clear, it is imperative not to "lose sight of the explicit grant of authority." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). Focusing upon the "explicit grant of authority" contained in the Twenty-first Amendment, this Court has on numerous occasions refused to permit the Amendment to be used as a shield to sustain state liquor regulations which transgress other constitutional imperatives. When such regulations have contravened those constitutional guarantees made applicable to the states through the Fourteenth Amendment, this Court has not hesitated to strike them down.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), the Court held that the Twenty-first Amendment did not insulate against invalidation a state statute which violated the due process clause of the Fourteenth Amendment. Acknowledging that the power of the states to regulate liquor "was extremely broad even prior to the Twenty-first Amendment[,]" 400 U.S. at 436, the Court nevertheless concluded that, since the statute at issue contravened the due process clause, it could not stand. Similarly, in *Craig* v. *Boren*, 429 U.S. 190 (1976) the Court struck down an Oklahoma statute establishing different drinking ages for men and women, rejecting in unequivocal terms the notion that a state's reference to the Twenty-first Amendment somehow could justify regulations which otherwise would violate the Fourteenth Amendment:

> "Appellees argue, however, that [the sections of the Oklahoma statute at issue] enforce state policies concerning the sale and distribution of alcohol and by force of the Twenty-first Amendment should therefore be held to withstand the equal protection challenge. . . . Our view

> is, and we hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." 429 U.S. at 204-05.

Less than a year ago, this Court held unconstitutional a Massachusetts statute which empowered churches and schools to veto applications for liquor licenses made by the owners of establishments located within 500 feet of such churches and schools. *Larkin* v. *Grendel's Den, Inc.*, 103 S. Ct. 505 (1982). Writing for the Court, Chief Justice Burger declared: "The State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 510 n.5.[3]

Thus, this Court has rejected the notion that states may circumvent constitutional guarantees or alter their force by invocation of the Twenty-first Amendment. This Court's decisions in *California* v. *LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981) (*per curiam*) make clear that the Twenty-first Amendment in no way suggests that direct restrictions on speech such as those at issue here can escape the full rigors of the First Amendment. Each dealt with regulations which, although affecting incidentally certain forms of expression engaged in at state-licensed

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3 *See also California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 114 ("the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program"); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (appellee was entitled to a decree enjoining the enforcement of a regulation promulgated by the Pennsylvania Liquor Control Board to the extent such regulation violated the equal protection clause of the Fourteenth Amendment); *Hornsby* v. *Allen*, 326 F.2d 605, 609 (5th Cir. 1964) (in characterizing as a violation of due process a municipality's arbitrary and capricious denial to appellant of a liquor license, the court declared that "states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment").

liquor establishments, were designed to control the *dispensation* of liquor, rather than the exercise of freedom of expression.

LaRue and *Bellanca* upheld the constitutionality of state regulations that prohibited the performance in licensed liquor establishments of enumerated sexual acts and topless dancing. In *LaRue*, after acknowledging that it would be erroneous to assert that "the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations[,]" 409 U.S. at 115, this Court emphasized that the regulation at issue applied only to state-licensed liquor establishments:

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118.

Similarly, in *Bellanca*, this Court explained: "the State has not attempted to bar topless dancing in 'any public place': As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor." 452 U.S. at 716. In the present case, by contrast, the Oklahoma constitutional and statutory provisions at issue are not aimed primarily at liquor dispensation. Instead, the Oklahoma laws prohibit liquor advertising by any medium of communication altogether.[4]

That the Twenty-first Amendment generally and this Court's decisions in *LaRue* and *Bellanca* specifically do not alter the

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4 Paradoxically, under Article 27, Section 5 of the Oklahoma Constitution, a state-licensed liquor establishment is the one place at which a single sign, bearing the words "Retail Alcoholic Liquor Store," may be erected. Thus, no prohibition is imposed in the one place where the Twenty-first Amendment grants the broadest regulatory power.

First Amendment protection otherwise to be accorded the commercial advertisements at issue here was most recently recognized by a majority of the Court of Appeals for the Fifth Circuit sitting *en banc* in *Dunagin* v. *City of Oxford* and *Lamar Outdoor Advertising Inc.* v. *Mississippi State Tax Commission* (Nos. 80-3762 and 82-4076) (5th Cir. October 31, 1983) (*en banc*). That case dealt with a similar state ban on liquor advertising.[5]

In his opinion concurring in the result, which established a majority for the rejection of the state's Twenty-first Amendment claims, Judge Williams wrote:

> "The purpose of the Twenty-first Amendment was to remove all constitutional inhibitions as to the state's power to control intoxicating liquors as against the power of the federal government, particularly but not exclusively in the domain of interstate and foreign commerce. It had nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution. The governments, state and federal, had exactly the same powers to control spirits after the passage of the Twenty-first Amendment as they had before, as against claims of individual liberty under free-speech, due process, and equal protection.
>
> "A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution

5 While the *en banc* panel ultimately upheld Mississippi's prohibitions against liquor advertising on grounds that the statute did not infringe the protections afforded commercial speech under the Constitution, both the concurring and dissenting opinions (joined by judges comprising a majority of the court) explicitly rejected the state's argument that the Twenty-first Amendment altered in any way the proper constitutional analysis to be applied. *See* slip op. at 488 (Williams, J., concurring, joined by Tate, J.); slip op. at 489 (Gee, J., dissenting, joined by Goldberg, Politz, Randall, and Higginbotham, JJ.). For all of the reasons set forth in point three of this brief, we believe that the disposition on the merits of the commercial speech claim in *Dunagin* was erroneous.

> places liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations." *Id.* at 488.

In his dissenting opinion for five members of the panel,[6] Judge Gee reviewed *Wisconsin* v. *Constantineau*, *supra*; *Craig* v. *Boren*, *supra*; and *Larkin* v. *Grendel's Den, Inc.*, *supra*, and concluded:

> "These cases establish that when state laws related to liquor regulation have come in direct conflict with constitutional guarantees that the Fourteenth Amendment requires the states to respect, the Supreme Court has reviewed the state laws according to the standards otherwise applicable to the constitutional guarantees. The Twenty-first Amendment did not change the standard of review. We believe that this principle should apply to the Constitution's guarantee of free speech as well as to its guarantees of equal protection and due process, and its prohibition of an establishment of religion. As we have explained, an exception to this principle, recognized in *LaRue* and *Bellanca*, was limited to liquor regulations that incidentally burden expression. Since that exception is not applicable to the Mississippi laws before us, we now turn to the application of customary commercial speech principles to the facts of this case." 701 F.2d at 330 (footnote omitted).

That is precisely what we believe this Court should do.

3. The Commercial Speech Issue

The Tenth Circuit's analysis of the commercial speech issue raised by this case simply misses the mark. The court ignored this Court's persuasive and, we believe, controlling opinion in

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6 Judge Gee's opinion had been written for the court in the companion case, *Lamar Outdoor Advertising, Inc.* v. *Mississippi State Tax Commission*, 701 F.2d 314 (5th Cir. 1983). He adopted it as the dissenting opinion in *Dunagin*.

Bigelow v. *Virginia*, 421 U.S. 809 (1975). The court failed to give any weight whatsoever to the fact that special scrutiny is appropriate here where Oklahoma's regulatory structure operates as a direct restraint on the media. The court failed even to give any deference to this Court's continuing caution against the wholesale prohibition of any category of truthful commercial speech. Rather, under the shadow of its erroneous view of the *Queensgate* summary dismissal and the Twenty-first Amendment, the Tenth Circuit woodenly—and erroneously—interpreted this Court's opinion in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) to uphold the statutory ban at issue. In so doing, the court resurrected the same paternalistic view of commercial speech that has been rejected consistently by this Court.

It would have been well for the Tenth Circuit to begin at the beginning. Not only did this Court's decision in *Bigelow* v. *Virginia*, *supra*, establish that commercial speech is entitled to a significant degree of First Amendment protection, but it is dispositive of this case.

In *Bigelow*, the editor of a Virginia newspaper was convicted for publishing an advertisement announcing the availability and legality of abortions in New York. At the time, abortion remained illegal in Virginia as did the publication of information encouraging or prompting the procuring of an abortion. Recognizing that the state had an important interest in safeguarding the health of its citizens, this Court nonetheless rejected Virginia's attempt to control what its citizens could and could not hear about commercial activities which were lawful in another state notwithstanding the fact that the same activity was unlawful in Virginia.

The parallels between the present case and *Bigelow* are compelling evidence of the error of the Tenth Circuit's opinion below. Here, as in *Bigelow*, the statute at issue purported to impose a flat prohibition on advertising of activity upon which the state frowned. Here, as in *Bigelow*, the prohibition extended to advertising which was neither deceptive nor mislead-

ing. Here, as in *Bigelow*, the prohibition affected the media as well as the advertisers themselves. There is, of course, one important distinction between *Bigelow* and the present case: the advertisements prohibited by Virginia in *Bigelow* related to activity which was unlawful in Virginia. By contrast, Oklahoma has prohibited the advertising of alcoholic beverages notwithstanding the fact that it has not chosen to make the sale of such beverages illegal. Thus, if anything, the state interest at issue here is less strong than that at issue in *Bigelow*. Unless the principles which guided this Court's decision in *Bigelow* are no longer valid, *Bigelow* should mandate reversal of the decision below.

The decision of the Tenth Circuit provides little guidance in this regard; that court failed even to cite to or discuss this Court's opinion in *Bigelow*. Yet a review of this Court's decisions since *Bigelow*, up to and including its most recent pronouncement in *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983) suggests no retreat from the principles first established by this Court in *Bigelow*. Indeed, that review confirms that this Court has never sanctioned a prohibition on the dissemination of truthful and non-deceptive commercial information concerning lawful activities.

This has been so despite the fact that the commercial messages brought before this Court have sought to advance interests of quite diverse natures (*compare Bigelow* v. *Virginia*, *supra*, *with Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*) and that their dissemination sometimes furthered, but also sometimes hindered, other important societal goals (*compare Bolger* v. *Youngs Drug Products Corp.*, *supra*, *with Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977)). Commercial speakers have been criticized before this Court for encouraging excessive energy consumption (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*); for implicitly encouraging segregation (*Linmark Associates, Inc.* v. *Township of Willingboro*); for uttering the offensive (*Carey* v. *Population Services International*, 431 U.S. 678 (1977)); and for simple

bad taste (*In re R.M.J.*, 455 U.S. 191 (1982)). Nonetheless this Court has consistently

> "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .'" *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 562 (quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

Apart from the fact that this Court has never sanctioned the wholesale prohibition of truthful commercial speech concerning lawful activities, there are two additional factors present here which should have cautioned the Tenth Circuit to apply special scrutiny to the instant case: Oklahoma's prohibition operates as a direct restraint against the media and its prohibition is all-encompassing.

That Oklahoma's regulatory scheme demands particularly close scrutiny due to its direct impact on the media was established in *Bigelow* itself:

> "The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.
>
> "If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The

> burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257-258 (1974). We know from experience that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.' 2 Z. Chafee, Government and Mass Communications 633 (1947). The policy of the First Amendment favors dissemination of information and opinion, and '[t]he guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.).' *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 150 (1967) (opinion of Harlan, J.)." 421 U.S. at 828-29 (footnote omitted).

That this Court has viewed total prohibitions on the dissemination of truthful commercial speech warily (as it has in other First Amendment contexts)[7] has, as well, been a constant theme running throughout this Court's opinions:

> "We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U.S., at 780, n.8 (Stewart, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to

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7 *See, e.g., Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.5 (1976) (Stevens, J., plurality opinion); *id.* at 81, n.4 (Powell, J., concurring). *See also Talley* v. *California*, 362 U.S. 60 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Schneider* v. *State*, 308 U.S. 147 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948).

unlawful activity." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 566 n.9.

See also In re R.M.J., *supra*, 455 U.S. at 206-07.

As it failed to consider the import of this Court's opinion in *Bigelow* v. *Virginia*, *supra*, so the Tenth Circuit ignored these considerations as well. Rather, relying on its reading of this Court's decision in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, the court upheld Oklahoma's broad regulatory scheme based on the view that it directly advanced the substantial governmental interest of reducing the sale and consumption of alcoholic beverages and that it was no more extensive than necessary to serve that interest.

It may, of course, always be said that flat prohibitions on speech about particular products may, or at least could, advance the interest of deterring use of the products. *Cf. Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 570; *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2883-84. As a factual matter, however, and as detailed in petitioner's submission to this Court (Pet. at 16) as well as in the district court's findings (Pet. at 42a), there is *nothing* in the record in this case to suggest that that is so.[8] Since it remains the case that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it," *Bolger* v. *Youngs Drug Products*

8 *Compare* Smart and Cutler, *The Alcohol Advertising Ban in British Columbia: Problems and Effects on Beverage Consumption*, 71 The British Journal of Addiction at 20 (1976) (empirical research yielded "little support for the view that the B.C. [British Columbian] advertising ban reduced alcohol consumption"); Ogbourne and Smart, *Will Restrictions on Alcohol Advertising Reduce Alcohol Consumption?*, 75 The British Journal of Addiction at 295 (1980) (it "seems unlikely that restrictions on advertising will reduce per capita consumption . . ."); van Iwaarden, *Advertising, Alcohol Consumption and Policy Alternatives*, Economics and Alcohol at 236 (1983) ("a ban on commercials will not have any direct impact on the overall use of alcohol[;] [e]ven in the long run the effects probably would be hardly substantial").

Corp., *supra*, 103 S. Ct. at 2882 n.20, there is no basis for sustaining the constitutionality of the Oklahoma law.

As for the question whether Oklahoma's prohibition is more extensive than is necessary to serve the state's interest, the Tenth Circuit's reasoning is less than clear. Essentially, the Tenth Circuit held that, because cable operators in Oklahoma could carry advertisements for products other than alcohol and because out-of-state speakers could disseminate advertising about alcoholic beverages to residents of Oklahoma, Oklahoma's scheme was not more extensive than necessary:

> "Even though Appellees are completely prohibited from rebroadcasting alcoholic beverage advertising, they are free to carry other forms of advertising. We recognize that the cable operators especially are placed in a difficult position; however, nothing in the First Amendment prohibits this result. *See Metromedia*, *supra*. On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising in out-of-state publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages." 699 F.2d at 502; Pet. at 24a.

This analysis turns the commercial-speech tests inside out. That cable operators (or broadcast stations) are not prohibited from carrying advertisements for other products simply begs the question whether Oklahoma's ban on the advertising of alcohol is more extensive than is necessary to support its state interest. This Court has certainly never found a prohibition on commercial speech to be no more extensive than necessary on the ground that the speaker nonetheless remained free to speak about other things. That other speakers (including liquor store owners and out-of-state publishers) could reach residents of Oklahoma with advertisements relating to alcohol is likewise no answer.[9] Even ignoring the fact that this suggestion high-

9 That out-of-state publishers could legally reach Oklahoma residents was not explicitly contemplated by Oklahoma's laws; rather, this has

lights the substantial problems raised under the equal protection clause by Oklahoma's regulatory scheme, this Court has recently reemphasized that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2882 n.18 (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)) (rejecting the government's argument that the challenged restriction did not significantly interfere with free speech on the ground that other channels of communication were not barred).

Unlike the district court, the Tenth Circuit declined even to explore whether less extensive regulation could have served the state's interest.[10] This is so despite the fact that the Ohio scheme at issue in *Queensgate*—a decision with which the court was familiar—provided one such example.[11]

The decision of the Tenth Circuit is one which simply overlooks the fundamental principles established throughout the years in this Court's opinions on commercial speech. It clings to a narrow and wooden reading of the guidelines set forth in *Central Hudson*. In so doing it ignored the fact that this Court has made clear that that case articulates but general

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been the interpretation subsequently given it. *See* 699 F.2d at 493, n.1; Pet. at 5a, n.1. The fact that out-of-state speakers are not silenced in Oklahoma also suggests the ineffectiveness of Oklahoma's efforts to advance its interests. In other words, since Oklahoma has decided that total suppression of speakers within the state is necessary to advance its interests, how can it be permitted to rely on the presence of other speakers to support its scheme?

10 This factor was critical in both of this Court's most recent decisions striking down prohibitions on speech about a particular product notwithstanding that those prohibitions served equally laudable goals. *Central Hudson*, *supra*; *Bolger* v. *Youngs Drug Products Corp.*, *supra*.

11 The regulations promulgated by Ohio employ means short of the wholesale prohibition imposed by Oklahoma. As discussed at pp. 5-6, *supra*, for example, they expressly permit manufacturers and distributors of alcoholic beverages to advertise their products. *See* Ohio Admin. Code § 4301:1-1-44.

guidelines derived from earlier opinions (*see In re R.M.J.*, *supra*, 455 U.S. at 204 n.16) and that these opinions in the richness of their factual detail provide guidance of which the Tenth Circuit never availed itself. Relying upon its interpretation of such general guidelines wrenched from the factual posture in which they arose, the court below wholly ignored the *Bigelow* decision. Instead, the court sanctioned a wholesale prohibition on truthful and nonmisleading commercial speech about lawful products. This result is unprecedented in decisions of this Court.

In the end, this case raises the question of the continued validity of the core proposition set forth in *Bigelow* and reaffirmed in later rulings of this Court: The "best means" for people to "perceive their own best interests" is "to open the channels of communication rather than to close them."

CONCLUSION

The decision of the Court of Appeals should be reversed.

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Respectfully submitted,

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